

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

One of the greatest challenges that post-independent Kenya faces is how to resolve competing claims over land.<sup>1</sup> On the one hand, are the genuine claims of the original inhabitants of particular lands, and, on the other, the claims of legal title holders who occupy the same land.<sup>2</sup> Today, some of the original inhabitants of those lands demand and claim restitution of their traditional land rights on the basis that they were dispossessed through historical and prevailing discriminatory legal processes.<sup>3</sup> Some of those groups do not have legal title to the lands they now claim, basing their demands on their customary laws, traditions and pre-colonial occupation.<sup>4</sup> However, Kenya's legal framework subjugates African customary law to written laws.<sup>5</sup> Consequently, legal title holders continue to own disputed lands, a situation that today threatens to erupt into a major ethnic conflict.<sup>6</sup>

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<sup>1</sup> See Report of the Office of the High Commission for Human Rights Fact-finding Mission to Kenya, 6-28 February 2008, 6 <<http://www.ohchr.org/Documents/Press/OHCHRKenya-report.pdf>> accessed 22 March 2008( OHCHR Kenya Report); see also the Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Government Printer, Nairobi, 2004, 1(Ndung'u Report).

<sup>2</sup> As above; see also Country Review Report of the Republic of Kenya, African Peer Review mechanism, May 2006 (Kenya APRM Report) 47-62.

<sup>3</sup> See for example, *Kemai and 9 others v AG and 3 others* Civil case No 238 of 1999 in eKLR (E& I) (*Ogiek* case); see also *Communication 276/2003, Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya* (Endorois case) (As of June 2008, the communication was still under consideration by the African Commission on Human and Peoples' Rights (ACHPR); see also Ndung'u Report (n 1 above) 1-22.

<sup>4</sup> See OHCHR Kenya Report (n 1 above); see generally on indigenous peoples struggles to reclaim their ancestral lands in a report prepared by EI Daes 'Indigenous peoples and their relationship to land: Final working paper' UN Doc E/CN.4/SUB.2/2001/21(Daes final working paper).

<sup>5</sup> See sec 115(2) Constitution of Kenya, Laws of Kenya, Revised Edition (1998) 1992; sec 3(2) Kenya Judicature Act, Laws of Kenya Cap 8; see also L Juma 'Reconciling African customary law and human

Indeed, the eruption of violence in Kenya after a disputed presidential election in December 2007 highlighted underlying issues of conflict among the more than 42 ethnic tribes scattered across the country.<sup>7</sup> Beyond the electoral dispute, historical land injustices in Kenya emerged as one of the root causes of the violence and related conflicts.<sup>8</sup> These injustices are aptly captured by a recent Kenya Draft National Land Policy:

Historical injustices are land grievances which stretch back to colonial land policies and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, treaties and agreements between local communities and the British. The grievances remain unresolved because successive post independence Governments have failed to address them in a holistic manner. In the post-independence period, the problem has been exacerbated by the lack of clear, relevant and comprehensive policies and laws.<sup>9</sup>

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rights in Kenya: Making a case for institutional reformation and revitalization of customary adjudication processes' (2002) 14 *Saint Thomas Law Review* 505.

<sup>6</sup> See HRW 'Ballots to bullets, organised political violence and Kenyan crisis of governance' 2008 (20) 1A *Human Rights Watch* 12-14; see also Ndung'u Report (n 1 above) 140-142.

<sup>7</sup> See HRW (n 6 as above); see also Kenya General Election 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat( 2007) 28; Although there could be more than 42 ethnic communities in Kenya, officially the State claims that there are about 42 ethnic communities see Kenya's initial State Report to the ACHPR pursuant to its obligations under art 62 of the African Charter on Human and Peoples' Rights (African Charter) considered during the 41<sup>st</sup> Ordinary Session of the ACHPR in Accra, Ghana, in May 2007, para 5; see the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, R Stavenhagen, Mission to Kenya, A/HRC/4/32/Add3 26 February 2007( Stavenhagen Kenya Mission Report) para 21 citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, Yakuu and other smaller ethnic groups from the list of 42 tribes of Kenya.

<sup>8</sup> Other causes of the conflict include the inequitable distribution of state resources such as jobs, infrastructure, skewed economic policies that fail to address the needs and demands of the poor and clamour for political power; see P Kagwanja 'Breaking Kenya's impasse, chaos or courts' 2008 (1) *Africa Policy Institute*, 1.

<sup>9</sup> See Draft National Land Policy, Government of Kenya, Nairobi, 2006, para 190.

Commentators across the political divide acknowledge that these are the deep-seated causes of the crisis in Kenya, and that allegations of a stolen election merely served to ignite the flames.<sup>10</sup> In fact, it was not the first time that such violence had been sparked by elections. The run-up to the 1992 and post-1997 general elections sparked similar violence that claimed hundreds of lives and displaced thousands of ‘non-indigenous’ residents in parts of the Rift Valley and Coast Provinces.<sup>11</sup>

According to surveys conducted, ‘increased population in the affected regions had put pressure on available land, forcing some of the indigenous people to seek ways of recovering land that was “irregularly” allocated to non-indigenous communities’.<sup>12</sup> The term ‘indigenous’ in this context is employed to denote the original inhabitants of particular lands in the various regions of the country. The Rift Valley Province, which has over the years been most affected by the ethnic land-related conflicts is one of the cosmopolitan regions in the country. Almost all the diverse tribes in Kenya inhabit lands in that region. Historically, however, its original inhabitants were the Ogiek and the Maasai.<sup>13</sup>

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<sup>10</sup> Kagwanja (n 8 above); see also ‘How state land policy shaped conflict’ *Daily Nation* 9 February 2008 <[www.nationaudio.com](http://www.nationaudio.com)> accessed 15 February 2008; see also ‘Answers to land problems depend on political will’ *East African Standard* 10 February 2008 <[www.eastandard.net](http://www.eastandard.net)> accessed 15 February 2008; International Crisis Group ‘Kenya in crisis’ 2008 (137) *Africa Report* 1.

<sup>11</sup> n 10 above; see also ‘By-elections campaigns stir up ethnic distrust’ *Daily Nation* 24 June 2008 <[http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=125971](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=125971)> accessed 24 June 2008.

<sup>12</sup> As above; see also OHCHR Kenya Report (n 1 above) 6; HRW (n 6 above) 14; Kenya APRM Report (n 2 above) 62.

<sup>13</sup> See J Lonsdale ‘The conquest state, 1895-1904’ in WR Ochieng (ed) *A modern history of Kenya 1895-1980* (1989)12; JEG Sutton ‘The Kalenjin’ in BA Ogot (ed) *Kenya before 1900 eight regional studies* (1976) 21-52; RH Blackburn ‘Okiek history’ in BA Ogot (ed) *Kenya before 1900 eight regional studies* (1976) 53-83; T Spear *Kenya’s past: An introduction to historical method in Africa* (1981).

The original inhabitants of the Rift Valley region felt aggrieved by what they term historical land injustices that were perpetrated against them by the colonial regime and successive independent governments.<sup>14</sup> It is therefore not surprising that the region has witnessed some of the worst forms of conflict and attendant violence over the years. This violence has targeted ‘non-indigenous communities’.<sup>15</sup> One of the recent gruesome attacks in the region included the burning to death of about 50 women and children who had sought refuge in a church after the 2007 general elections.<sup>16</sup>

The original inhabitants of the Rift Valley trace the ‘theft’ of their ancestral lands back to colonial rule.<sup>17</sup> The British colonial regime altered the dynamics of land control, use and access by indigenous communities through the imposition of English property law.<sup>18</sup> Okoth-Ogendo rightly observes that the implementation of the laws was purely aimed at legitimising the colonialists’ expropriation of Africans land.<sup>19</sup> The impact of the colonial legal framework was outright dispossession of the natives. The best arable pieces of land then known as the ‘white highlands’, the majority of which were in the Rift Valley, were acquired by colonial settlers.<sup>20</sup>

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<sup>14</sup> See HRW (n 6 above) 14; see also Kenya APRM Report (n 2 above) 49.

<sup>15</sup> See HRW (n 6 above) 14; see also Kenya APRM Report (n 2 above) 49.

<sup>16</sup> See Kagwanja (n 8 above) 4.

<sup>17</sup> See HRW (n 6 above) 14.

<sup>18</sup> See HWO Okoth-Ogendo *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya (1991)* 16-17; see also YP Ghai and JPWB McAuslan *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present (1970)* 25-30.

<sup>19</sup> As above.

<sup>20</sup> Ghai & McAuslan (n 18 above) 85.

Foreign laws were employed to disinherit the indigenous communities of their lands.<sup>21</sup> Through the promulgation of Orders in Council, the colonial authorities controlled virtually all the land in Kenya.<sup>22</sup> Despite promises and hopes by indigenous peoples that independence in 1963 would facilitate the return of their ancestral lands, these can best be described as ‘dreams shattered’. Indeed, according to the African Peer Review Mechanism’s Country Report of the Republic of Kenya ‘after the departure of the British colonial administration, a few ethnic groups managed to amass significant portions of land in the former ‘white highlands’.<sup>23</sup> That was made possible through the retention and entrenchment of the colonial laws and policies relative to land rights thereby legitimising dispossessions of the original owners of the lands. Inevitably, aggrieved communities have not relented in their agitation for the return of their ancestral lands, often accompanied by violence, mass destruction of property and gross loss of lives.<sup>24</sup> However, successive independent governments have continued to gloss over the issue of land disputes.<sup>25</sup> Instead, they have elected to ignore a deep-seated historical injustice, arguing that the law should take its course.<sup>26</sup> According to Wanjala, ‘the land policies that were relentlessly pursued by the colonial government and later continued or at the very least modified by the “independence” government have generated deep rooted problems which at various times have threatened to

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<sup>21</sup> SC Wanjala ‘Land ownership and use in Kenya: Past present and future’ in SC Wanjala *Essays on land law: The reform debate in Kenya* (2000) 27-29.

<sup>22</sup> As above.

<sup>23</sup> See Kenya APRM Report (n 2 above) 47.

<sup>24</sup> As above 49; see also HRW (n 6 above).

<sup>25</sup> Kenya Draft National Land Policy para 190.

<sup>26</sup> SC Wanjala ‘Themes in Kenya land reform’ in Wanjala (n 21 above) 172.

destroy the fabric of Kenyan society'.<sup>27</sup> The written laws which are relied upon by the legal title holders and the government subjugate the customary laws of the original occupiers of the same lands.

The independent government justified the retention of colonial land laws on the grounds that 'the independent Constitution had provisions which tied the hands of the government. Land could not just be acquired for redistribution to the landless Africans without full and prompt compensation for the settlers'.<sup>28</sup> That argument and its continued implementation to this date are part of the problem. The wholesome acceptance and entrenchment by the independent state of the colonial land laws betrayed the people who fought for independence. Although, apart from the armed struggle, the granting of independence was arrived at through political negotiations, most land laws disinherited the indigenous peoples from their lands. It was therefore imperative that a solution be found that would take into consideration the interests and rights of the original inhabitants of the lands that were appropriated by the settlers through foreign laws.

Instead, the independent Government elected to retain those laws which gave an upper hand to those in power.<sup>29</sup> The independent state further exacerbated the situation by adopting the principle of 'willing buyer willing seller' in land transactions, resulting in the original inhabitants of certain lands remaining landless. As a result of this policy, communal and ancestral lands were appropriated by outsiders who had the means to purchase the lands, leading

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<sup>27</sup> As above.

<sup>28</sup> As above.

<sup>29</sup> Kenya Draft National Land Policy para 25.

to inequitable distribution of that resource. While this is perfectly legal and protected by the law, in light of diminished arable land resources, this resulted in a strained peaceful co-existence between indigenous peoples and those perceived to be ‘outsiders’. ‘Outsiders’ have been targeted for ejection, as evidenced by the post-2007 violent evictions and deaths, particularly in the Rift Valley Province.

While one may want to wish away the current crisis in Kenya as purely political, it has become increasingly impossible to ignore one of the root causes of the problem. In the circumstances, the need for a comprehensive land reform process can not be overemphasized. Indeed, there is a need to balance the rights of land holders who have legally acquired land in any part of the country with those of the original inhabitants. Most of these inhabitants have genuine claims over their ancestral and traditional lands –claims which pit them against the legal title holders.

The Kenyan legal framework favours and protects legal title holders. Registered land owners acquire an absolute and indefeasible title to land unless such land was obtained by fraud or mistake and subject only to encumbrances.<sup>30</sup> A controversial provision is that first registrants are

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<sup>30</sup> See sec 27 Registered Land Act, Laws of Kenya Cap 300 (1963) ( RLA) which provides that: Subject to this Act - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease; see also sec 28 RLA. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;...; see also sec 143(1) RLA.

not hampered by fraud or mistake from enjoying absolute and indefeasible title.<sup>31</sup> Indeed, such legal protection of registered title holders has made it difficult for original claimants to their traditional lands to find recourse in Kenya's courts.<sup>32</sup> These hurdles of proving title are further compounded by the status of customary law in the hierarchy of Kenya's sources of law. African customary law, which in such circumstances would accord title to the original inhabitants of certain territories, is according to Kenya's Constitution subordinate to all written laws and its application limited by the repugnancy clause.<sup>33</sup>

This thesis seeks to identify legal arguments available to the original inhabitants of lands now occupied by non-residents, to protect their land rights. In so doing, it examines Kenya's legal framework, including comparable case law and applicable international standards.

The thesis argues that the international human rights standards and norms, apply to the situation of these groups. Recent developments in international jurisprudence as well as that of comparable domestic jurisdictions point to a growing recognition that certain communities have been marginalized and dispossessed of their land due to historically-discriminatory laws and

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<sup>31</sup> Sec 143(1) RLA Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

<sup>32</sup> Wanjala (n 21 above) 27-29.

<sup>33</sup> Sec 115(2) Constitution of Kenya.



practices.<sup>34</sup> This thesis argues that some of those norms and comparable jurisprudence can be applied in Kenya to redress past wrongs against indigenous peoples with regard to the protection of their traditional lands.

This is particularly so since some of these communities have self-identified as indigenous peoples and associating themselves with the global indigenous rights movement.<sup>35</sup> That is notwithstanding the fact that the question of ‘who is indigenous’ is highly controversial in Kenya, as is the case in most other African countries.<sup>36</sup> The reference to indigenous peoples in this thesis is therefore to the original inhabitants of the specific territories they claim to be their ancestral lands, now occupied by ‘outsiders or non-original residents’, as well as groups who self-identify as such. The thesis employs two case studies of such groups- the Maasai and the Ogiek- to illustrate the point.

The indigenous rights regime is an important framework for ventilating land rights for some of these communities. The regime derives international standards and comparable best practices from similarly-situated jurisdictions, which the thesis argues could apply in the Kenyan context, beside, the existing domestic legal framework. To a certain extent, the thesis argues, Kenya’s

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<sup>34</sup> See J Gilbert ‘Historical indigenous peoples land claims: A comparative and international approach to the common law doctrine on indigenous title’ (2007) 56 *International and Comparative Law Quarterly* 583-612.

<sup>35</sup> See *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa* Adopted by the African Commission on Human and Peoples’ Rights (African Commission) at its 28<sup>th</sup> Ordinary Session, ACHPR & IWGIA (2005) 92; Stavenhagen Kenya Mission Report (n 7 above) para 10; see also International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World* (2007) 468; Report of the Round Table Meeting of Experts on Minorities and Indigenous Peoples in Kenya, Kenya National Commission on Human Rights and Centre for Minority Rights Development, Nairobi, 30-31 October 2006, 4 (Report of the Round Table Meeting Nairobi).

<sup>36</sup> As above.

legal framework has some potential to protect the rights of indigenous peoples. In that regard, the thesis presents applicable legal resources that can be invoked to give meaning to original inhabitants' land rights through progressive interpretation. It also makes a case for legal reform, since progressive interpretation by the courts can not be guaranteed. Such reforms would seek to address the loopholes that constrain the legal recognition and the protection of indigenous peoples' rights to their ancestral lands.

While the focus of the thesis is limited to Kenya, that country's experiences are shared by many other African countries, as is illustrated in a number of examples cited in some of the ensuing chapters. The aim of this chapter is to: (1) give an overview of the thesis; (2) briefly discuss the question of 'who are indigenous peoples?'; (3) examine the relevance of the concept 'indigenous peoples' in realising the groups' fundamental human rights in Kenya; (4) outline the focus of the study- 'indigenous peoples land rights'; and (5) identify the research methodology.

## 1.2 Who are indigenous peoples?

There is no global consensus on the definition of the term 'indigenous peoples'.<sup>37</sup> In fact, a debate rages as to whether the concept is applicable in certain regions of the world, particularly

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<sup>37</sup> See examples of some attempted definitions, related discussions and historical account of the development of the concept in SJ Anaya *Indigenous peoples in international law* (2004) 3-72; see also ACHPR & IWGIA (n 35 above) 87-95; P Thornberry *Indigenous peoples and human rights* (2002) 33-60; see also KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006 (6) (2) *African Human Rights Law Journal* 384-391.

Africa and Asia.<sup>38</sup> In some jurisdictions, the term ‘indigenous peoples’, evokes sentiments of the past, pitting European imperialists against colonized peoples.<sup>39</sup> In these circumstances, ‘indigenous peoples,’ are seen as communities who were the original inhabitants of territories today under the domination of ‘descendants of European settler populations’.<sup>40</sup> In countries where such a framework no longer exists, some states have argued that the term is inapplicable.<sup>41</sup> In Africa, the question of the definition of ‘who is indigenous’ on the continent remains contentious.<sup>42</sup> African states have expressed concern that the lack of a definition would cause conflict and tension among various ethnic groups resident within their territories.<sup>43</sup> They argue that the absence of defined parameters of the groups to whom the concept ‘indigenous’ applies is likely to cause problems of implementation, especially in light of the fact that they consider all Africans to be indigenous to the continent.<sup>44</sup> African states appear wary of the possibility that the recognition of a certain section of their population as indigenous would be tantamount to according those groups preferential treatment. They also fear that it would lead to secession of

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<sup>38</sup> See for example Thornberry (n 37 above) 2; see also B Kingsbury “indigenous peoples” in international law: A constructivist approach to the Asian controversy’ (1998) 92 *American Journal of International Law* 414.

<sup>39</sup> Thornberry (n 37 above) 2.

<sup>40</sup> As above.

<sup>41</sup> IWGIA (n 35 above) 559-560; see also ACHPR & IWGIA (n 35 above) 12.

<sup>42</sup> See Africa Group, *Draft Aide Memoire*, UN Declaration on the Rights of Indigenous Peoples, 9 November 2006, para 2.1.

<sup>43</sup> As above para. 2.2; see also Advisory Opinion of the African Commission on Human and Peoples’ Rights on the UN Declaration on the Rights of Indigenous Peoples, Adopted by the African Commission on Human and Peoples’ Rights, at its 41st Ordinary Session, Accra, Ghana, May 2007 sourced at <[www.iwgia.org](http://www.iwgia.org)> accessed 10 August 2008, para 9.

<sup>44</sup> Advisory Opinion of the African Commission (n 43 above) paras 9 and 13.

the recognized ‘indigenous peoples’ and destabilize regional peace.<sup>45</sup> The fear by states of the possibility of secession by indigenous peoples is revisited in more detail later in the thesis.

From the foregoing, it is apparent that the fears of African states seem to have been founded on the misconception that indigenous peoples seek a separate and distinct identity from that of the state.<sup>46</sup> Far from it, the clamour by indigenous peoples for recognition does not constitute a demand for special treatment or separate legal regime, but rather ‘to guarantee the equal enjoyment of the rights and freedoms of groups, which have been historically marginalised’.<sup>47</sup> The African Commission’s Working Group of Experts on Indigenous Populations/Communities ‘acknowledges that except for a few exceptions involving communities that migrated from other continents or settlers from Europe, Africans can claim to be aboriginal people of the continent and nowhere else’.<sup>48</sup> The term ‘indigenous peoples’ in Africa, therefore, is not based on the concept of aboriginality, where particular groups can be said to have been the first peoples of the territories they occupy.<sup>49</sup>

The emphasis on aboriginality is located in one of the most oft-cited definitions of indigenous peoples, by Martinez Cobo, the first UN Special Rapporteur of the UN Sub-Commission on the

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<sup>45</sup> Africa Group, *Draft Aide Memoire* (n 42 above) paras 3.0 and 5.0; see also Advisory Opinion of the African Commission (n 43 above) para 9.

<sup>46</sup> See Advisory Opinion of the African Commission (n 43 above) para 16-31.

<sup>47</sup> As above, para 19.

<sup>48</sup> ACHPR & IWGIA (n 35 above) 12.

<sup>49</sup> See Advisory Opinion of the African Commission (n 43 above) para 13.

Prevention of Discrimination and Protection of Minorities (later renamed the Sub-Commission on the Promotion and Protection of Human Rights):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>50</sup>

While Cobo's statement is not definitive, in that it is open to various interpretations, and has been criticised for its focus on aboriginality,<sup>51</sup> it captures some of the key elements contemporary indigenous movements have identified as applying to their circumstances. These include the fact that most of these groups are vulnerable due to historical conditions, are in a non-dominant position, have an attachment to their ancestral territories and cultural identity, and are determined to preserve, develop and transmit their territories and identity to future generations.<sup>52</sup> Cobo's elements could be considered as affirming similar characteristics spelt out by ILO Convention

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<sup>50</sup> See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination Against Indigenous Population, UN ESCOR, 1986 UN Doc E/CN.4 Sub2 1986/7/Add.1-4, para 379 (Cobo's Report).

<sup>51</sup> See ACHPR & IWGIA (n 35 above) 91-92 -Cobo's definition has been criticized on 'the grounds that aboriginality is not the only determining factor and not enough importance is placed to the principle of self-identification and on contemporary situations'.

<sup>52</sup> International standards, studies and institutions that have identified similar criteria include the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991 art 1(ILO Convention No 169); World Bank Operational Directive 4.20(1991); ACHPR & IWGIA (n 35 above) 89-90; Working Group on Indigenous Populations, Working Paper by the then Chairperson-Rapporteur, El Daes on the Concept of "Indigenous People," U.N ESCOR, Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, 14<sup>th</sup> Sess, U.N.Doc.E/CN.4/Sub.2/AC.4/1996/2, 1996, 5 (Daes Concept paper).

No169.<sup>53</sup> It is instructive to note that the ILO Convention No 169 is one of only two treaties specifically dealing with indigenous peoples' rights- the other being the ILO Convention No 107.<sup>54</sup> While no African state has ratified this treaty, the standards it enumerates continue to inspire indigenous peoples globally to demand the recognition of their fundamental rights.<sup>55</sup> Article 1(2) of the ILO Convention No 169 provides for the principle of self-identification, which has become the fundamental criterion for determining which groups are considered indigenous peoples.

Given the divergence of opinion, particularly among states, on the question of indigenous peoples, international standard-setting mechanisms and indigenous peoples themselves have advocated a human-rights-based approach to the concept, rather than a focus on aboriginality.<sup>56</sup> Spurred by recent advances and awareness of their rights through active participation within the United Nations (UN) framework and regional human rights mechanisms, indigenous peoples have endorsed the self-identification criterion as being instrumental in determining who they are.<sup>57</sup> They have similarly identified with international and regional standard-setting fora to draw

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<sup>53</sup> Art 1 ILO Convention No 169 '...peoples....who irrespective of their legal status retain some or all of their own social, economic, cultural and political institutions'.

<sup>54</sup> Countries that had ratified ILO Convention No 107, which was considered assimilationist are still bound by its provisions. In Africa these countries include: Tunisia, Malawi, Guinea- Bissau, Ghana, Egypt and Angola <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>>accessed 13 February 2006.

<sup>55</sup> Some of the standards enumerated by the ILO Convention No 169 are also reflected in the recently adopted UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N.Doc.A/RES/47/1 (2007).

<sup>56</sup> A Eide & EI Daes, Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples,*E/CN.4/Sub.2/2000/10*, para 37.

<sup>57</sup> See ACHPR & IWGIA (n 35 above) 92-3 endorsing the modern analytical understanding of the concept also advocated by the United Nations Working Group on Indigenous Populations which gives the following criteria as applicable in identifying indigenous peoples: (1) The occupation and use of territory; (2) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social

attention to their predicament and particular circumstances and, where possible, assert their fundamental human rights.<sup>58</sup>

Therefore, the term ‘indigenous’ is today used by ‘particular marginalised groups in a modern analytical form of the concept’.<sup>59</sup> The modern application of the term does not focus on aboriginality but rather on issues of concern to indigenous peoples ‘in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from’.<sup>60</sup> ‘These are groups who have, due to past and ongoing processes, become marginalised in their own countries and they need recognition and protection of their basic human rights’.<sup>61</sup> Their ‘culture and way of life has been subject to discrimination and contempt and their very existence are under threat of extinction’.<sup>62</sup> The groups feel that they ‘have been left on the margins of development and are perceived negatively by dominating mainstream development paradigms’.<sup>63</sup> The communities are ‘determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems’.<sup>64</sup>

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organisation, religion and spiritual values, modes of production, laws and institutions; (3) self-identification, as well as recognition by other groups, as a distinct collectivity; (4) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, see Daes concept paper (n 52 above).

<sup>58</sup> See Anaya (n 37 above) 57-58, 72.

<sup>59</sup> ACHPR & IWGIA (n 35 above) 88.

<sup>60</sup> ACHPR & IWGIA (n 35 above) 88.

<sup>61</sup> As above 86.

<sup>62</sup> As above 87.

<sup>63</sup> As above.

<sup>64</sup> Cobo’s Report (n 50 above).

The African Commission's Working Group on Indigenous Populations/Communities in Africa has adopted an approach which focuses on the following criteria:

Self identification as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalisation, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.<sup>65</sup>

A possible rationale for the Commission's approach is the fact that in Africa, the decolonisation processes transferred state powers to groups dominant in the territory. Certain groups remained vulnerable primarily due to their close attachment to their traditional cultures and their reluctance to assimilate and embrace western developmental paradigms adopted by the post-colonial state.<sup>66</sup> It is some of these groups who today self-identify as indigenous peoples and demand recognition and protection of their fundamental rights in accordance with their culture, traditions and way of life.

While the rights claimed by indigenous peoples are not necessarily any different from those sought by other marginalised groups, it is to be borne in mind that those groups self-identifying as indigenous peoples are generally excluded in fact and law from utilising available options due to various circumstances. Some of these factors include the dire poverty levels amongst these

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<sup>65</sup> ACHPR & IWGIA (n 35 above) 93.

<sup>66</sup> I Brownlie (FM Brookfield ed) *Treaties and indigenous peoples* (1992) 56.



peoples, to the extent they are regarded as being among the ‘poorest of the poor’.<sup>67</sup> Most indigenous peoples are therefore unable to access the existing legal framework to champion their rights and when they do manage this, they are continuously disadvantaged by either a lack of comprehension (due to illiteracy and misinformation) or the inability of the system to give meaningful expression to their rights.<sup>68</sup>

The majority of those communities fall within two categories identified by the African Commission’s Working Group of Experts on Indigenous Populations in Africa, namely, the pastoralists and hunter-gatherers.<sup>69</sup> In Kenya, the pastoralists include the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana and Somali and the hunter-gatherer communities comprise the Awer(Boni), Ogiek, Sengwer or Yaaku.<sup>70</sup> All of these groups self-identify as indigenous peoples. For purposes of this thesis, the focus falls on two groups, the Maasai and Ogiek. The choice of the two groups as case studies is based on the fact that there is less controversy as to their indigenous status from the perspective of the African Commission on Human and Peoples’ Rights’ approach to the subject. Indeed, the African Commission expressly identifies these two groups as some of the most marginalised communities in Kenya due to their culture and particular way of life. The focus on the two groups is also due to the fact that their predicament exemplifies similar legal issues faced by many other indigenous communities in

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<sup>67</sup> Independent Commission on International Humanitarian Issues *Indigenous Peoples, A Global Quest for Justice* (1987) 16-17.

<sup>68</sup> Advisory Committee on Human Rights and Foreign Policy ‘Indigenous Peoples’ (1993) 16 *Advisory Report, Netherlands*, 7, 18 (Advisory Committee, Netherlands).

<sup>69</sup> ACHPR & IWGIA (n 35 above) 92; see also IWGIA (n 35 above) 468.

<sup>70</sup> See Stavenhagen Kenya Mission Report (n 35 above) para 10; see also IWGIA (n 35 above) 468; Report of the Round Table Meeting Nairobi (n 35 above).

Kenya and Africa generally. They also represent both pastoralist (the Maasai) and hunter-gatherer (Ogiek) communities whose land tenure systems, despite some similarities, are distinct.

### 1.3 Relevance of the concept ‘indigenous peoples’ in realising the groups’ fundamental human rights

In recent times, international processes,<sup>71</sup> judicial<sup>72</sup> and quasi-judicial bodies,<sup>73</sup> experts,<sup>74</sup> scholars,<sup>75</sup> and indigenous peoples themselves<sup>76</sup> have increasingly drawn attention to the subject

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<sup>71</sup> See for example efforts within the International Labour Organisation that resulted in the (ILO Convention No.169 in L Swepston’ The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption’ in C Cohen Human Rights of indigenous peoples (1998); the United Nations Working Group on Indigenous Populations that resulted in a United Nations Declaration on the Rights of Indigenous Peoples; The United Nations Permanent Forum on Indigenous Issues (ECOSOC Res. E/RES/2000/22 (July 28, 2000); ACHPR & IWGIA (n 35 above HRC General Comment No 23 (n 100 above) e); see Various General Comments and Concluding Observations of the United Nations Human Rights Committee(HRC) and the Committee on the Elimination of Racial Discrimination( some of which are discussed in chapter four) such as the United Nations Committee on the Elimination of Racial Discrimination (CERD)*General Recommendation XXIII: Rights of Indigenous Peoples*, U.N. Doc. A/52/18 Annex V (Aug. 18, 1997).

<sup>72</sup> See for example *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC) (South Africa); *Sesana & others v Attorney General*, (52/2002) [2006] BWHC 1(Botswana); *Mabo v Queensland (No 2)* (1992) 175 CLR 1(Australia); *Delgamuukw v British Columbia*, [1997] 153 D.L.R. (4<sup>th</sup>) (Canada).

<sup>73</sup> See for example at the UN Human Rights Committee the case of *Lubicon Lake Band v Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990). At the Inter-American Commission and Court see for example the cases of *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 79 Inter-American Court on Human Rights SER. C, (2001); *Maya Indigenous Community of Toledo District v Belize*, Case 12.053, Report No. 40/04, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.122 Doc. 5 rev., (2004); *Mary & Carrie Dann v United States*, Case 11.140, Report No. 75/02, Inter-American Commission on Human Rights, Doc. 5 rev. 1 (2002); At the African Commission on Human and Peoples’ Rights see the pending case of *Endorois* ( n 3 above).

<sup>74</sup> See Cobo’s Report (n 50 above); Stavenhagen Kenya Mission Report (n 35 above); Report of the UN Special Rapporteur on Indigenous Peoples Mission to South Africa 2005(E/CN.4/2006/78/Add.2) (Stavenhagen South Africa Mission Report); Eide & Daes (n 47 above).

<sup>75</sup> Anaya (n 37 above); Thornberry (n 37 above); BK Roy & G Alfredsson ‘Indigenous rights: The literature explosion’ (1987) 13 *Transnational Perspectives* 19; P Aiko & M Scheinin (eds) *Operationalizing the right of indigenous peoples to self-determination* (2000); RA Williams ‘Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples’ survival in the world’ (1990) 39

and the issues of concern to these groups. Developments within international law and comparative domestic legal jurisdictions herald an emerging framework on which indigenous peoples may base their demands for rights protection.<sup>77</sup> This is the indigenous peoples' rights regime anchored by international human rights law standards and processes such as the ILO Convention No 169,<sup>78</sup> the work of the UN Working Group on Indigenous Peoples, which has resulted in a Declaration on the Rights of Indigenous Peoples<sup>79</sup> and other standard-setting fora, such as the UN Permanent Forum on Indigenous Issues<sup>80</sup> and the UN Special Rapporteur on Indigenous Peoples.<sup>81</sup> Regionally, the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities in Africa<sup>82</sup> is similarly emerging as an important platform for indigenous peoples to develop region-specific standards.

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*Duke Law Journal*; S Wiessner 'The rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Journal* 57.

<sup>76</sup> See for example the Annual Reports of the International Work Group on Indigenous Affairs (IWGIA), *The Indigenous World* <[www.iwgia.org](http://www.iwgia.org)> accessed on 10 August 2007.

<sup>77</sup> See Anaya (n 37 above) 49-72; see also JS Anaya & RA Williams RA Jr 'The protection of indigenous peoples' rights over lands and natural resources under the Inter-American Human Rights System' (2001) 14 *Harvard Human Rights Journal* 33; Wiessner (n 75 above) 57.

<sup>78</sup> ILO Convention No 169.

<sup>79</sup> UN Declaration on the Rights of Indigenous Peoples.

<sup>80</sup> Establishment of a Permanent Forum on Indigenous Issues, UN ESCOR, 2000, Supp. No. 1, *UN Doc. E/2000/99*, 50.

<sup>81</sup> Commission on Human Rights Resolution E/CN.4/RES/2001/57.

<sup>82</sup> See ACHPR & IWGIA (n 35 above); see also reports of the African Commission's Working Groups of Experts on Indigenous Populations/Communities various country study missions and activities cited at IWGIA (n 35 above) 586-590.

The fundamental issues of concern to groups self-identifying as indigenous peoples, are generally similar all over the world and are due to historical processes of discrimination and subjugation.<sup>83</sup>

The indigenous peoples' rights framework is therefore a unique strategic avenue that attracts global attention to indigenous peoples' issues. It is also associated with international standard-setting mechanisms and norms.<sup>84</sup> Indigenous peoples all over the world have therefore sought to identify with the global indigenous peoples' rights regime, in a bid to utilize its mechanisms and standards to protect their fundamental human rights.<sup>85</sup> By identifying with that regime, these groups highlight their particular circumstances. This scenario calls for the application of the principles of 'equity, justice and fair dealing' to relations between a dominant group and a marginalised one.<sup>86</sup>

Granted, there is considerable debate as to the 'usefulness of linking specific rights to indigenous groups'.<sup>87</sup> It has been argued that the rights sought by groups identifying as indigenous peoples are not any different from those by other people who have been denied their fundamental human rights by the state.<sup>88</sup> In which case then, the rights could be espoused and if found wanting

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<sup>83</sup> ACHPR & IWGIA (n 35 above) 87; see also J Beauclerk, J Narby & J Townsend *Indigenous peoples a field guide for development, development guidelines* No 2 (1988) 3.

<sup>84</sup> Anaya (n 37 above) 72.

<sup>85</sup> As above.

<sup>86</sup> Brownlie (n 66 above) 1; Gilbert (n 34 above) 610.

<sup>87</sup> Kingsbury (n 38 above) 3.

<sup>88</sup> As above.

guaranteed by the existing legal frameworks as with all other human rights violations.<sup>89</sup> Indeed, existing legal resources encompass rights and mechanisms that have the potential to give effect to indigenous peoples' demands, as held in the Australian High Court Case of *Gerhardy v Brown* in which Mason J stated that the concept of human rights 'though generally associated in Western thought with the rights of individuals, extends also to the rights of peoples and the protection and preservation of their cultures'.<sup>90</sup>

However, while the general corpus of human rights law may potentially be invoked to realise the rights of indigenous peoples, where its application is limited by a restrictive interpretation, it is useful to adopt legal reforms that expressly provide for recognition and protection of certain rights that are exercised by marginalised communities. Indeed, while indigenous peoples' predicament is not always much different from other resource-constrained people living in far-flung and remote corners of different countries, they are particularly affected due to their way of life and cultural set-up. The collective exercise of group rights by indigenous peoples 'involve[s] elements of recognition of the cultural or other identity of the group, which recognition is not ensured by the normal application of the provisions representing individual rights'.<sup>91</sup>

Accordingly, legal frameworks that give prominence to individual rights may not adequately address the needs and aspirations of some indigenous groups who elect to exercise certain rights

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<sup>89</sup> As above; see also Brownlie (n 66 above) 2; JJ Corntassel & TH Primeau 'Indigenous 'sovereignty' and international law: Revised strategies for pursuing "self determination" (1995) 17 *Human Rights Quarterly* 42-65.

<sup>90</sup> Thornberry (n 37 above) 4 citing *Gerhardy v Brown* (1995) 149 CLR 70, 104-05.

<sup>91</sup> Brownlie (n 66 above) 29; see also generally on indigenous peoples' 'strong sense of solidarity that emerges from their inherent need to preserve and retain their culture, way of life and common heritage' in Thornberry (n 37 above) 331; Anaya (n 37 above) 141.

collectively. It has been argued that ‘there will continue to be claims which, while they might warrant recognition in the form of attribution of rights, cannot easily be translated into individual rights’.<sup>92</sup> Such rights include the right to self-determination, and collective rights to land and natural resources and cultural entitlements. ‘The simple fact that these rights cannot be accommodated in the framework of individual rights does not in itself constitute grounds for ignoring such claims all together.’<sup>93</sup> However, the lack of understanding by the state of the specific needs of indigenous peoples continues to hamper the realisation of these rights as does the lack of scope and capacity by indigenous peoples to invoke legal protection mechanisms.

Due to economic and political marginalisation as a result of unfavourable and skewed state policies, existing legal frameworks have failed to adequately address indigenous peoples’ preferred way of life. Indigenous peoples’ subjugation is mainly because of their cultural identity as a group, which leads to discrimination and excision from all spheres of the state.<sup>94</sup> The fact that indigenous peoples are also in a non-dominant position within the political and state structures exacerbates their situation.<sup>95</sup> This is evidenced by the enactment and retention of laws and policies that do not take into account their particular needs and demands. A number of indigenous peoples, notably the pastoralists in Kenya, have sought recognition and the protection of their land and resource rights and prefer to own, control and utilise them communally. This has often caused tension and conflict with existing legal instruments and state policies that provide

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<sup>92</sup> Advisory Committee Netherlands (n 68 above) 4.

<sup>93</sup> As above 17.

<sup>94</sup> Anaya (n 37 above) 129-130.

<sup>95</sup> Advisory Committee Netherlands (n 68 above) 18.

for and encourage individual land tenure. In the absence or due to inadequacy of legal backing and government support, most of these communities have been dispossessed of their traditional lands and resources. Concrete examples and further discussion of these issues are revisited in chapter four of this thesis.

Although the concept ‘indigenous peoples’ is a useful and strategic rallying call to galvanise support and draw attention to the issues faced by groups who self-identify as indigenous in Kenya, the inadequacy of the legal framework to right historical and continued land injustices, similarly affects other marginalised communities. That is particularly the case, where the marginalised communities are dependent on land for economic sustenance and basic survival.

#### **1.4 Indigenous peoples’ land rights**

While indigenous peoples globally are faced with numerous human rights violations, the focus of this thesis is on one of the core rights demanded by indigenous peoples - the right to land. Although the focus is on land rights this inevitably overlaps with natural resource rights. Land rights are indisputably core claims by indigenous peoples globally, and particularly in Africa. The centrality of land for indigenous peoples is based on the fact that they rely on traditional lands and natural resources for their livelihood, economic sustenance, as well as religious and cultural life.<sup>96</sup> ‘Indigenous peoples’ rights over land and natural resources flow not only from

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<sup>96</sup> See Study on Indigenous People and their Relationship to Land, by Daes EI, UN Doc.E/CN.4/Sub.2/1999/18, 3 June 1999, para.18 (Daes study); see also Anaya (n 37 above) 141; J Asiema & FDP Situma ‘Indigenous peoples and the environment: The case of the pastoral Maasai of Kenya’ (1994) 5 *Colorado Journal of International Environmental Law and Policy* 150; R Hitchcock R & D Vinding ‘Indigenous peoples’ rights in Southern Africa: An introduction’ in R Hitchcock R & D Vinding (ed) *Indigenous peoples rights in Southern Africa* (2004) 11.

possession, but also from their articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits'.<sup>97</sup> The rights to access, control, utilize and own traditional lands and natural resources are therefore critical to the survival of indigenous peoples all over the world.<sup>98</sup>

Some states' laws do not give regard to and often conflict with indigenous peoples' rights over these lands.<sup>99</sup> In Kenya, for example, while there are relevant provisions within the law that could be invoked to give meaning to indigenous peoples' land and resource rights, the legal framework is generally inadequate with regard to protection of these communities. There is overwhelming evidence of the state's disregard for the particular demands of indigenous peoples, manifested by inadequate or total lack of consultation and participation of these groups in issues that affect them, including the way in which their lands should be utilized. The recognition of indigenous peoples' laws, traditions and customs is therefore crucial to the protection of their rights to land and natural resources.<sup>100</sup>

Groups self-identifying as indigenous peoples in Kenya have been and still marginalised by the state. This is primarily through the lack of recognition that their rights deserve protection in accordance with their traditions and culture. Instead, the state has pursued policies of

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<sup>97</sup> Anaya (n 37 above) 141; see also Cobo's Report (n 50 above) 39.

<sup>98</sup> See Williams (n 66 above) 681.

<sup>99</sup> Brownlie (n 66 above) 56.

<sup>100</sup> See part II ILO Convention No 169; Art 26 UN Declaration on the Rights of Indigenous Peoples; see also *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992, para 9.5; see also Human Rights Committee, General Comment 23, Art 27 (55th session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994) 38, para 7.



assimilation. This state of affairs is sanctioned by legal and administrative policies that have little, if any, regard for the needs, demands and aspirations of the indigenous peoples themselves. This includes lack of legal recognition of the collective nature of most of their claims.<sup>101</sup> A long history of indifference to indigenous peoples has therefore resulted in extreme levels of poverty and a violation of their fundamental human rights and freedoms. Similarly, like other indigenous peoples globally, ‘these communities have been forced to endure decision making on issues which materially affect them without having been able to have an equal say in this process and thus exert any real influence’.<sup>102</sup>

The economic livelihood of indigenous peoples in Kenya is severely affected by the lack of an adequate legal framework protecting their traditional lands and resources, as well as policies that mainly favour the dominant economic paradigms.<sup>103</sup> In Kenya, like in most other African countries, settled agriculture, mining, and modern development schemes are seen as the preferred way of development.<sup>104</sup> As a result, certain types of indigenous peoples’ economic means of livelihood, such as nomadic pastoralism, hunting and gathering, are looked down upon, putting their future survival and development in serious jeopardy.<sup>105</sup> The sustainability and development potential of their cultural systems are also ignored and are wrongly perceived as primitive,

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<sup>101</sup> Advisory Committee Netherlands (n 68 above) 4.

<sup>102</sup> As above 4.

<sup>103</sup> As above 2; IWGIA (n 35 above) 468–470.

<sup>104</sup> See J Ngugi ‘The decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa’ (2002) 20 *Wisconsin International Law Journal* 300.

<sup>105</sup> ACHPR & IWGIA (n 35 above) 29; Stavenhagen Kenya Mission Report (n 35 above) para 17.

uneconomic, environmentally destructive and incompatible with modernisation.<sup>106</sup> The state continues to systematically marginalize indigenous peoples ‘on the basis of their economic, social and cultural characteristics, which are inextricably connected to the use of land and natural resources’.<sup>107</sup> It also attempts to assimilate these peoples by promoting westernised ideals of development, calling upon these communities to discard their rich cultures and ways of life and instead adopt modernity.<sup>108</sup> This is usually done in total disregard of the communities’ strengths, needs and preferences and is often without adequate consultation and participation of the community.<sup>109</sup>

The scope of this study is limited to an examination of the current legal framework in Kenya and the extent it protects indigenous peoples’ rights to land. On the basis of international standards and comparable jurisprudence from other jurisdictions, the study makes a case for comprehensive reform. The study discusses the available arguments within the existing legal framework and applicable human rights standards that would give effect to indigenous peoples’ land and resources rights in Kenya. It also examines the applicability of developing international standards and comparable regional and domestic norms within the indigenous rights regime that give meaning to indigenous peoples’ land and resource rights. Towards this end, relevant jurisprudence from comparable domestic, regional and international human rights fora is examined. The analysis identifies best practices and deficiencies and postulates possible options

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<sup>106</sup> Stavenhagen Kenya Mission Report (n 35 above) para 17.

<sup>107</sup> As above para 11.

<sup>108</sup> As above; Report of the Round Table Meeting Nairobi (n 35 above).

<sup>109</sup> The Maasai group ranches discussed in chapter three of this thesis is a case in point.

in the protection of indigenous peoples' rights to land and resources in Kenya that could also be applicable in most other African countries.

## **1.5 Research methodology**

The argument of this thesis is primarily based on a review of literature on indigenous peoples' rights in general. Particular focus is given to indigenous peoples' land rights. The thesis surveys the relevant legal framework in Kenya, notably the Constitution, statutes, case law and applicable international and regional norms, particularly with regard to land and resource rights. The thesis also examines international, regional and comparable domestic human rights standards and jurisprudence, especially emerging standards that protect indigenous peoples' rights.

The thesis also benefits from shared practical experiences whilst conducting desk and in-depth studies in Kenya and South Africa on a joint research project of the International Labour Organisation and the African Commission on Human and Peoples' Rights that examines constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa. The research entailed engagement, discussion and dialogue with indigenous peoples, indigenous peoples' experts, government representatives, civil society and other relevant actors such as international institutions. Through these interactions this thesis has gained considerable insights on indigenous peoples' concerns, deficiencies in the law and suggestions of a suitable legal framework that vindicates their fundamental human rights.

The research has also benefited from participation in certain sessions of the African Commission on Human and Peoples' Rights (African Commission) and particularly meetings of the African

Commission's Working Group of Experts on Indigenous Populations/Communities in Africa. Some of the information in this research has also been gathered through participation and engagement with experts and indigenous peoples' representatives in a number of international and local conferences, workshops and training sessions.

## **1.6 Chapter overview**

The thesis is divided into six chapters. Chapter one is an introduction and sets out the content and structure of the research. The Chapter commences with a discussion of the concept 'indigenous peoples' and examines its relevance in the realization of the groups fundamental human rights. The Chapter sets out the focus of the thesis and methodology adopted in the research.

Chapter two is a survey of the land and resource rights of indigenous peoples. It puts into context one of the core claims by indigenous peoples, namely land. It is an examination of the relation between indigenous peoples and their land. The chapter proceeds to discuss the main problems that hamper the realization of land rights by indigenous peoples.

Chapter three examines Kenya's legal framework as it relates to land. Using two case studies, that of the Maasai and the Ogiek, the chapter illustrates the hurdles faced by indigenous peoples in vindicating their land rights in Kenya.

Chapter four assesses the extent to which the current legal framework can vindicate indigenous peoples' land rights. It reviews the application of various international norms, comparative

common law jurisprudence and makes a case for the progressive interpretation of the legal framework by Kenyan courts of law in order to give meaning to indigenous peoples' land rights.

Chapter five surveys some of the legal resources that have been employed to recognise and protect indigenous peoples land rights in two comparable jurisdictions in Africa: South Africa and Namibia. This is done in a bid to identify best practices that may inform a suitable legal framework to vindicate indigenous peoples' land rights in Kenya.

Chapter six identifies possible legal reforms that would guarantee the protection of indigenous peoples land rights in Kenya. By recourse to identified best practices in South Africa and Namibia as well as international standards and norms, the chapter proffers possible legal reforms that, if adopted, would vindicate indigenous peoples' land rights in Kenya.

## CHAPTER TWO

### LAND RIGHTS AS CORE CLAIMS OF INDIGENOUS PEOPLES IN KENYA

#### 2.1 Introduction

This chapter discusses land as one of the core claims of indigenous peoples in Kenya. The chapter commences by tracing the relationship of indigenous peoples in Kenya with their lands. The chapter explores the main issues of concern of these groups in Kenya with regard to their lands. These issues are: (1) lack of (or inadequate) legal recognition and protection of their lands; and (2) lack of (or inadequate) consultation and participation on issues affecting their lands.

#### 2.2 Relation between indigenous peoples and their lands

The majority of communities in Sub-Saharan Africa rely on agrarian economies and, as such, view land as an important factor in their existence.<sup>110</sup> Indeed, access to land and natural resources was at the core of the anti-colonial wars waged in a number of countries on the continent.<sup>111</sup> Communities relying on land and natural resources for their subsistence have therefore cultivated special relationships with the lands and territories they occupy.<sup>112</sup> These communities exhibit some form of connection with their lands as evidenced through inheritance, burial rites and other

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<sup>110</sup> J Blocher J 'Building on custom: Land tenure policy and economic development in Ghana' (2006) 9 *Yale Human Rights and Development Law Journal* 169; see also B Maragia 'The indigenous sustainability paradox and the quest for sustainability in post-colonial societies: is indigenous knowledge all that is needed?' (2006) 18 *Georgetown International Environmental Law Review* 205.

<sup>111</sup> See Ndung'u Report (n 1 above) xvii.

<sup>112</sup> See Maragia (n 110 above) 205.

cultural activities. Lands provide a source of livelihood and, over time, a spiritual connection to the ancestors whose remains are buried in those lands. Communities identify with certain landmarks within their territories such as special trees, rivers, dams, lakes, hills, mountains, caves and similar natural features. Various communities associate these landmarks with their sense of being and their spiritual heritage. Cultural and religious activities are often celebrated in the vicinity of these landmarks or invoke their spiritual significance.

That said, the majority of these communities have today adopted modern means of livelihood and while retaining some attachment to their ancestral lands, particularly in the case of rural communities, do not depend solely on particular lands. Indeed, most agrarian communities such as the Kikuyu of Kenya are known to migrate to alternative lands if available, settle there and establish complete allegiance to their new-found territories.<sup>113</sup> To most of these communities, economic gains are the primary animating factor in their relationship to lands rather than community cultural values, beliefs and welfare. Additionally, some of these communities prefer individual ownership to lands and resources in a bid to optimize output for individual gains.<sup>114</sup>

On the other hand, ‘of the common traits that indigenous peoples share, probably the most notable is the retention of a strong sense of their distinct cultures and traditions’.<sup>115</sup> In Kenya, indigenous peoples have a strong attachment to their unique and rich culture and traditions which

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<sup>113</sup> See J Glazier *Land and the uses of tradition among the Mbeere of Kenya* (1985) 202.

<sup>114</sup> J Kenyatta *Facing Mount Kenya* (1979) 21 (Kenyatta was the first President of Kenya); see also K Kibwana ‘Land tenure in pre-colonial and post-independent Kenya’ in W Ochieng (ed) *Themes in Kenya history* (1990) 232.

<sup>115</sup> See Daes study (n 96 above) para 18.

they make every conscious effort to transmit to their future generations.<sup>116</sup> However, these cultures and traditions have been misunderstood and subjected to negative stereotyping by dominant groups.<sup>117</sup> Given that dominant groups, due to their numerical strength, have occupied the majority of leadership positions in the State, the dominant cultures are promoted and regarded as more ‘civilized’.<sup>118</sup>

On the whole, indigenous peoples practice traditional economic activities that demand that they inhabit and reside in particular lands and territories that support their way of life.<sup>119</sup> The hunter-gatherer communities of Kenya, such as the Ogiek, traditionally inhabit forests and rely on hunting, gathering wild fruits and bee-keeping for their survival.<sup>120</sup> However, due to severe land alienation and the reduction of their traditional territories, some have resorted to small-scale farming.<sup>121</sup> Consequently, their cultures and traditions are rapidly becoming extinct.<sup>122</sup>

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<sup>116</sup> Stavenhagen Kenya Mission Report (n 35 above) para 25.

<sup>117</sup> Report of the Round Table Meeting Nairobi (n 35 above) 7, 10.

<sup>118</sup> Stavenhagen Kenya Mission Report (n 35 above) para 22-24.

<sup>119</sup> As above para 25; ACHPR & IWGIA (n 35 above) 89.

<sup>120</sup> Stavenhagen Kenya Mission Report (n 35 above) para 36-41; see also JT Kimaiyo, *Ogiek Land Cases and Historical Injustices 1902-2004*, Vol 1, Ogiek Welfare Council, (2004).

<sup>121</sup> Stavenhagen Kenya Mission Report (n 35 above) para 25-35.

<sup>122</sup> As above, para 36.



The traditional lands of these indigenous peoples provide the means for their livelihood, economic sustenance, as well as their religious and cultural life.<sup>123</sup> Indeed, most of these indigenous peoples are almost entirely dependent on the lands they occupy.<sup>124</sup> Their lifestyles and way of life are best sustained by the particular lands they inhabit, unlike most other communities who would thrive on any productive lands that they elect to occupy.<sup>125</sup> The pastoralists, such as the Maasai, inhabit savannahs and semi-arid plains, lands whose only viable economic activity requires communal land ownership. Accordingly, ‘each person in those communities’ exercises rights of access to the land dependent upon his/her specific needs at a particular time’.<sup>126</sup> As such, while each member of the community or particular group resident in a region could access the land, there exist clear guidelines governing such access and control from community leaders. The community determines the best way and means to utilize their land resources dependent on the prevailing climatic and weather conditions.<sup>127</sup>

Kenya’s indigenous peoples have since time immemorial opted to retain and perpetuate their deep-seated cultures and traditions. These indigenous peoples hold onto their distinct economic, social and cultural characteristics, which have also been the basis of their discrimination and subjugation by the state, on the assumption that these cultures hinder modern development.<sup>128</sup>

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<sup>123</sup> IWGIA (n 35 above) 468; Daes study (n 96 above) para 18; Asiema & Situma (n 96 above); Hitchcock & Vinding (n 96 above) 11; HRC General Comment No. 23 (n 100 above).

<sup>124</sup> W Kymlicka *The rights of minority cultures* (1995) 43.

<sup>125</sup> See Glazier (n 113 above) 202.

<sup>126</sup> Wanjala (n 21 above) 26.

<sup>127</sup> IWGIA (n 35 above) 468.

<sup>128</sup> Stavenhagen Kenya Mission Report (n 35 above) para 11.

The Maasai, for example, exhibit deep-rooted ties to their lands and natural resources. According to Tarayia, this reliance on traditional lands is premised on the fact that they depend on livestock (which rely on pasture, water and salts on the lands) for their upkeep and daily sustenance.<sup>129</sup> This relationship governs the entire lifestyle of the Maasai, ranging from movement dependent on the livestock needs and other cultural activities. Certain lands are set aside for cultural practices and ceremonial occasions such as ‘the *Enkutoto-E-Purko* in the Kinopop area of Kenya, which is used for the *Eunoto* ceremony to terminate warriorhood and free young adults for junior elder status’.<sup>130</sup> It is upon the observance of these rites ‘that men may settle and marry. They are also absorbed into the decision-making structures of the society, sitting in conflict resolution fora and articulating customary norms in marriage according to traditional legal mechanisms. The *Endoinyo Oolmoruak* in Tanzania and the *Nainmina Enkiyio* area of *Loita* in Kenya are also reserved for religious and cultural rituals’.<sup>131</sup>

Fergus Mackay, a member of the Maori indigenous community in New Zealand, suggests that indigenous peoples’ attachment to their territories is not merely to any piece of land but to the specific place where that land is situated.<sup>132</sup> It is on the level of the specific territories that indigenous peoples’ relationship with the lands they occupy assumes a special connection that is

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<sup>129</sup> GN Tarayia ‘The legal perspectives of the Maasai culture, customs and traditions’ (2004) *21(1) Arizona Journal of International & Comparative Law* 186.

<sup>130</sup> As above 187.

<sup>131</sup> Tarayia (n 129 above) 187.

<sup>132</sup> F Mackay Presentation during proceedings of a workshop on ‘Indigenous peoples and minorities in Africa’ organised by the Southern African Institute for Advanced Constitutional Law and the Centre for Human Rights, University of Pretoria, 13-14 April 2006, Pretoria, South Africa.

basic to their existence and is linked to their beliefs, customs, traditions and culture.<sup>133</sup> They are therefore attached to specific traditional lands and not just any piece of land.<sup>134</sup> These are lands where they have lived for generations and the attachment is linked to the fact that the lands have a cultural and spiritual connection.<sup>135</sup> As such, while most other communities may still view land as being more than a means of production, to those self-identifying as indigenous peoples, their land and natural resources epitomize their unique culture and collective nature, and are usually their only way of survival.<sup>136</sup>

Admittedly, there is a very indistinct difference between most rural communities and groups self-identifying as indigenous peoples in terms of reliance on the lands they inhabit for their economic sustenance. However, the focus of this thesis is limited to those claims by peoples who are affected more than any other group in Kenya due to the historical circumstances and the way they have elected to live.<sup>137</sup> Those are groups that have self-identified as indigenous peoples, and, as will emerge in subsequent chapters, continue to suffer serious human rights violations related to their land rights. Indeed, the UN Special Rapporteur on Indigenous Peoples in his Mission Report on Kenya observed that:

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<sup>133</sup> Cobo's Report (n 50 above) paras 196 and 197.

<sup>134</sup> Daes concept paper (n 52 above) para 64; Brownlie (n 66 above) 39.

<sup>135</sup> HJ Deacon & J Deacon *Human beginnings in South Africa: Uncovering the secrets of the Stone Age* (1999) 132; Hitchcock & Vinding (n 96 above) 11.

<sup>136</sup> See Williams (n 75 above) 681.

<sup>137</sup> Stavenhagen Kenya Mission Report (n 35 above) para 25-41.

Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country's land tenure system.<sup>138</sup>

The International Working Group on Indigenous Affairs (IWGIA), an authoritative international civil society organizations on indigenous peoples rights, has similarly noted that Kenya's legal framework 'works against the human rights of indigenous peoples in a number of ways as, through evictions or restriction of movement, they deny indigenous peoples access to their resources and primary sources of livelihood'.<sup>139</sup> Indigenous peoples themselves have also decried the fact that the state continues to destroy their culture and dispossess them of their lands and territories through 'so called development projects such as mining, logging, oil exploration, privatization of their territories, and tourism'.<sup>140</sup> The violation of Kenya's indigenous peoples' culture and land dispossession 'led to the displacement of whole communities and the destruction of the environment, their traditional economies and other practices which had sustained them since time immemorial'.<sup>141</sup> Other issues related to indigenous peoples' land and resource rights include: resource-related conflicts due to incursions by dominant communities; environmental degradation and desertification; lack of consultation and participation in the management of their

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<sup>138</sup> Stavenhagen Kenya Mission Report (n 35 above) para 25.

<sup>139</sup> Stavenhagen Kenya Mission Report (n 35 above) para 25-54.

<sup>140</sup> See Statement of the Loodoariak Community Land and Development Programme in Kenya at the nineteenth session of WGIP cited in Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, R Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90, 21 January 2003, para 20(Stavenhagen on the impact of large scale projects).

<sup>141</sup> n 140 above para 20.

resources; and continued marginalization and exclusion from infrastructural and development programs.<sup>142</sup> To illustrate the situation of indigenous peoples in Kenya with regard to their land and resource rights the next sections highlight some of these peoples' key concerns.

### **2.3 Issues of concern by indigenous peoples in their demand for recognition and protection of their land rights**

According to Daes, 'the gradual deterioration of indigenous societies can mainly be traced to the lack of recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other basic human rights'.<sup>143</sup> Pre-colonial and post-colonial regimes continue to impose their cultural biases to dispossess and illegally expropriate indigenous peoples' lands and resources.<sup>144</sup> This situation persists in Kenya and stems from continued discriminatory laws and policies inherited from its colonial past.<sup>145</sup> Upon independence, the country pursued social, political and economic policies that embraced westernized development paradigms which had little regard for the cultural diversity of its peoples.<sup>146</sup> Accordingly, indigenous peoples who elected to retain their cultures and traditions were left at the periphery of the modern state's development agendas and programs.<sup>147</sup> This has

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<sup>142</sup> As above.

<sup>143</sup> Daes final working paper (n 4 above) 78.

<sup>144</sup> Daes final working paper (n 4 above) 78; see also IG Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji (ed) *Constitutionalism an African debate* (1991) 33.

<sup>145</sup> Stavenhagen Kenya Mission Report (n 35 above) para 14.

<sup>146</sup> As above.

<sup>147</sup> Stavenhagen Kenya Mission Report (n 35 above) para 14.

led to massive expropriation of their lands, exclusion from development and dire poverty levels. Erika Daes is similarly of the view that ‘the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of certain states’.<sup>148</sup>

The African Commission likewise observes that indigenous peoples in Africa ‘are subject to domination and exploitation within national, political, and economic structures that are commonly designed to reflect the interests and activities of the national majority’.<sup>149</sup> Such attitudes have culminated in two recurrent problems that equally face indigenous peoples of Kenya with regard to their rights to lands and natural resources. These problems are at the core of indigenous peoples’ struggles and include: inadequate and or non-existent legal recognition and protection of their lands and resources; and a lack of consultation and participation on matters involving their lands and resources. The next section examines these two problems.

### **2.3.1 Inadequate or lack of legal recognition of indigenous peoples’ rights to lands**

One of the greatest challenges facing indigenous peoples in Kenya is the inadequacy of the legal framework to redress the historical discrimination and exclusion of marginalised communities.<sup>150</sup> The legal framework limits the application of traditional legal systems thus disregarding the

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<sup>148</sup> Daes final working paper (n 4 above) 79; see similar views in Anaya (n 37 above) 142.

<sup>149</sup> ACHPR & IWGIA (n 35 above) 63.

<sup>150</sup> Stavenhagen Kenya Mission Report (n 35 above) para 11; Stavenhagen South Africa Mission Report (n 74 above) paras 20-32.

culture, way of life, and preferred mode of economic sustenance of these communities.<sup>151</sup> Indeed, indigenous peoples in Kenya have decried the fact that the state continues to destroy their culture and alienate their lands and territories through ‘the so called development projects such as mining, logging, oil exploration, privatization of their territories, and tourism’.<sup>152</sup> The violation of Kenya’s indigenous peoples’ culture and land dispossessions have ‘led to the displacement of whole communities and the destruction of the environment, their traditional economies and other practices which had sustained them since time immemorial’.<sup>153</sup>

Kenya recently acknowledged that while in the past it did not take any active measures to preserve and protect minorities, ‘there has been a gradual acceptance of their status and efforts are being made to not only recognise these minorities, but also encourage their survival and protection’.<sup>154</sup> Some of these communities have been subsumed with the rest of society through an unofficial policy of assimilation and integration of numerically smaller tribes into some dominant ones.<sup>155</sup> These include smaller pastoralist and hunter gatherer communities such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu and such others who are excluded from official statistics.<sup>156</sup> The UN Special Rapporteur observes that ‘this situation is derived from colonial

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<sup>151</sup> IWGIA (n 35 above) 468-470; Report of the Round Table Meeting Nairobi (n 35 above) 10.

<sup>152</sup> Stavenhagen on impact of large scale projects (n 140 above) para 20.

<sup>153</sup> As above.

<sup>154</sup> Second Periodic Report of Kenya to the UN Human Rights Committee, CCPR/C/KEN/2004/2 para 212.

<sup>155</sup> Stavenhagen Kenya Mission Report (n 35 above) para 21.

<sup>156</sup> As above.

policy of promoting assimilation of smaller communities into other dominant groups'.<sup>157</sup> This has had the effect of reducing the visibility or leaving out such assimilated communities from national policy-making and budget allocations.<sup>158</sup> The lack of official recognition has caused indigenous peoples 'exclusion in policy processes, non-effective consultation in development and become victims of assimilation'.<sup>159</sup>

The failure to recognize indigenous peoples and their aspirations, which include the ownership, control and management of their lands in accordance with their culture and traditions, continues to entrench the historical discrimination that has pervaded these groups for generations.<sup>160</sup> This exclusion is mainly takes the form of laws and policies that do not reflect indigenous peoples' proprietary rights.<sup>161</sup> Discrimination and unequal treatment takes the form of lack of access or insufficient access to basic socio-economic rights, and a poor infrastructure in their places of habitat. This is a direct result of their perceived reluctance to assimilate and adopt modernity.<sup>162</sup> Further, due to their relatively inferior numbers as compared to dominant communities, they are not, to a large extent, in a position to be equitably represented in political structures of the state, such as parliament, the executive and judiciary, save for where affirmative action measures are

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<sup>157</sup> Stavenhagen Kenya Mission Report (n 35 above) para 21.

<sup>158</sup> As above.

<sup>159</sup> Stavenhagen Kenya Mission Report (n 35 above) para 11; see also Report of the Round Table Meeting Nairobi (n 35 above) 4.

<sup>160</sup> Daes final working paper (n 4 above) 144 para 40-48.

<sup>161</sup> Anaya (n 37 above) 142.

<sup>162</sup> IWGIA (n 35 above) 468-69.



adopted.<sup>163</sup> In effect, most indigenous peoples in Kenya lack a voice to ensure that resources in the country are equitably distributed as well as to challenge this discrimination.<sup>164</sup>

Kenya's domestic legal order has failed to adequately address these groups' problems.<sup>165</sup> Indeed, since the colonial regime, pastoralism has 'been neglected and held in disrepute by economic planners and policy makers', instead promoting sedentary lifestyles based on crop farming and commercial ranching.<sup>166</sup> Hunter-gatherers and forest-dwellers such as the Ogiek have not been spared either; their traditional forests were nationalized, which led to mass evictions and displacement. Some of these communities were settled away from their natural habitats.<sup>167</sup> The Ogiek hunter-gatherers were forcefully removed from the Mau forest, through the gazettelement of the forest, in effect denying them access to their traditional lands which were the sources of their cultural and spiritual nourishment as well as a source of livelihood.<sup>168</sup>

These communities' situation is aggravated by the fact that lands traditionally owned by indigenous peoples are viewed and treated as belonging to no one in particular or to the state

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<sup>163</sup> Stavenhagen Kenya Mission Report (n 35 above) paras 22-24.

<sup>164</sup> IWGIA (n 35 above) 468.

<sup>165</sup> See Stavenhagen South Africa Mission Report (n 74 above) paras 26-32; see also ILO/ African Commission on Human and Peoples Rights, Report of the Workshop to determine the scope and methodology of the research, Examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa, 18-20 September 2006, Yaoundé ( in file with author).

<sup>166</sup> See Stavenhagen Kenya Mission Report (n 35 above) para 17.

<sup>167</sup> ACHPR & IWGIA (n 35 above) 20.

<sup>168</sup> Kimaiyo (n 120 above).

since they are not demarcated or allotted to an individual title-holder.<sup>169</sup> This is a view erroneously adopted by the state from the colonial law doctrine of *terra nullius* and was applied to mean ‘that indigenous lands are legally unoccupied until the arrival of a colonial presence and can therefore become the property of the colonial power through effective occupation’.<sup>170</sup> The consequences of regarding indigenous lands as legally unoccupied have been to effectively disinherit them of their traditional territories as well as subject them to modern development paradigms bent on further alienation and subjugation.<sup>171</sup> States have thus either declared some of these lands as government lands and where they have not nationalized these resources, they have encouraged private individuals to put to ‘better’ use the lands. Such ‘better’ use include large scale commercial ranching, private conservancy projects, real estate development, the awarding of resource extraction concessions such as mining, logging, where applicable, and even military training and exercise zones for foreign troops.<sup>172</sup>

In Kenya, settled agriculture, mining, tourism and modern development schemes are seen as the preferred way to development. Certain types of indigenous peoples’ way of livelihood such as nomadic pastoralism, hunting and gathering, are therefore looked upon negatively and their

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<sup>169</sup> See Daes final working paper (n 4 above) 81; see also in the Kenyan context I Lenaola, H Hadley H. Jenner & T Wichert ‘Land tenure in pastoral lands’ in C Juma and JB Ojwang (ed) *In land we trust, environment, private property and constitutional change* (1996) 238.

<sup>170</sup> Daes final working paper (n 4 above) 79; see the ICJ ruling on the invalidity and erroneous application of the doctrine in *Western Sahara, Advisory Opinion*, 1975 ICI. 12; see also the *Mabo v Queensland* (n 72 above) where the High Court in Australia declared the doctrine of *terra nullius* unjust and discriminatory and therefore unacceptable.

<sup>171</sup> See Wanjala (n 21 above) 25; see also Lenaola *et al* (n 169 above) 238.

<sup>172</sup> Stavenhagen on impact of large scale projects (n 140 above) page 2 & para 23.

future survival and development are put in jeopardy.<sup>173</sup> The sustainability and development potential of these cultural systems are ignored and are perceived as being primitive, uneconomic and environmentally-destructive and as incompatible with modernisation. The states attempts to assimilate indigenous communities by promoting westernised ideals of development, calling upon these communities to discard their rich cultures and ways of life to adopt modernity. This is usually done in total disregard of the communities' strengths, needs and preferences and is often without any or adequate consultation and participation of the community.

Of key concern to indigenous peoples, especially pastoralists, is the fact that they prefer communal land tenure while the legal framework in Kenya favours individualized land regimes. While some communities in pre-colonial Kenya held land communally, 'tendencies of individual land tenure were discernible in certain ethnic groups of Central Kenya'.<sup>174</sup> Jomo Kenyatta argues that 'according to the Kikuyu customary law of land tenure every family unit had a land right of one form or another. While the whole tribe defended collectively the boundary of their territory, every inch of land within it had its owner'.<sup>175</sup> However, even where certain parcels of land belonged to individuals there were 'what was referred to as 'commons' which was territory which served the interests of the community in its corporate status, such as common pathways, watering points, grazing fields, recreational areas/grounds, meeting venues, ancestral and cultural

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<sup>173</sup> ACHPR & IWGIA (n 35 above) 29 'The need to increase exports has led to intensification of agricultural production and unplanned cultivation of semi arid areas leading to uncontrolled clearing of forests Areas set aside for dry season grazing by pastoralists have been cleared and cultivated. The underlying anti pastoralists bias dominating rural development policies encourages the spread of farming at the expense of pastoralism often leading to conflicts over scarce resources'.

<sup>174</sup> See Kibwana (n 114 above).

<sup>175</sup> Kenyatta (n 114 above) 21.

grounds and such others'.<sup>176</sup> Kenyatta states that land ownership was based on tribal territorial boundaries which he asserts were 'what the Europeans have misinterpreted to mean "tribal ownership or communal land"'.<sup>177</sup> It is not surprising, therefore, that upon independence, with the Kikuyu at the political helm, the country adopted individualized land tenure systems as had been advanced by the colonial regime.<sup>178</sup> Indeed, the Kikuyu have been at the forefront of championing an individualized land tenure system in Kenya.<sup>179</sup>

However, amongst indigenous peoples, especially the pastoralists, an individualized land tenure system are neither a viable option nor compatible with their cultural aspirations and way of life.<sup>180</sup> In Kenya, as is the case in a number of other jurisdictions, indigenous peoples have sought communal land ownership as opposed to individual land tenure systems.<sup>181</sup> Apart from cultural and traditional reasons for seeking the collective recognition of their rights, these groups inhabit

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<sup>176</sup> Ndung'u Report (n 1 above) 2.

<sup>177</sup> As above.

<sup>178</sup> Wanjala (n 21 above) 26.

<sup>179</sup> See Ngugi (n 104 above) 342.

<sup>180</sup> ACHPR & IWGIA (n 35 above) 24. For example in Kenya in the 1970s the World Bank sponsored a land titling project whose intention was to increase agricultural productivity through the introduction of individual titles. However the effect was decreased productivity, serious insecurity of tenure, landlessness and economic vulnerability. These policies continue in Kenya with many disastrous effects for the pastoralists, especially the Maasai, who have ended up losing their land that is crucial to their livelihood and many today find themselves completely impoverished. There are also examples of treaties signed between the British and the Maasai in 1904 and 1911- (See copies of the 1904 and 1911 Maasai agreements in Carter Report (n 252 below) Appendix VIII; For a detailed expose of the Maasai treaties see MPK Sorrenson *Origins of European Settlement in Kenya* (1968) 190-209; see also Hughes (n 241 below) 178-182; see also Ghai & McAuslan (n 18 above) 20-25. The validity of the treaties and attempts to seek the return of the lost Maasai lands is still subject to judicial action. Indeed at the Lancaster House Conference in the 1960s, the Maasai refused to sign the constitutional arrangements on account of disagreements over their land question; see also Asiema & Situma (n 96 above) 149; On the San in South Africa see J Suzman *Regional assessment of the status of the San in Southern Africa* (2001)34.

<sup>181</sup> Advisory Committee Netherlands (n 68 above) 4.

lands that may only be suitable for communal sharing of resources.<sup>182</sup> Pastoralists such as the Maasai, for example, occupy lands in arid and semi-arid regions including savannahs suitable for livestock keeping.<sup>183</sup> While these lands are expansive, they are not suitable for sedentary agricultural farming and nature demands that these resources are utilized and managed in sustainable ways, failing which serious adverse repercussions are experienced, including drought and environmental degradation. However, over the years, these resources have systematically been alienated by the state and other private entities leading to shrinkage, in effect reducing the resource-base of these communities with attendant survival and environmental consequences.<sup>184</sup> Indeed, the Maasai have always and still prefer to manage their traditional lands communally for cultural and pragmatic reasons.<sup>185</sup>

The dispossession of the Maasai traditional lands has been sanctioned through such processes as the infamous 1904 and 1911 colonial treaties,<sup>186</sup> and lately through the group ranches scheme.<sup>187</sup>

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<sup>182</sup> Advisory Committee Netherlands (n 68 above) 4.

<sup>183</sup> ACHPR & IWGIA (n 35 above) 17.

<sup>184</sup> As above 21.

<sup>185</sup> Tarayia (n 129 above) 205-206.

<sup>186</sup> See the Maasai Court challenge of the treaties in 1913 in the *Ole Njogo and others v Attorney General of the E. A Protectorate* (1914) 5 EALR 70. The case is analysed at depth in Hughes (n 241 below) 89-104; The Maasai argued that they had not been consulted and therefore did not consent to the treaties. According to the Plaintiffs in the *Ole Njogo* case, the signatories to the treaties on the Maasai side had no mandate to do so and that the community was therefore duped into entering into the agreements; see also AW Kabourou 'The Maasai land case of 1912: A reappraisal' (1988) 17 *Transafrican Journal of History*. See also Mwangi 'The transformation of property rights in Kenya's Maasai land: Triggers and motivations' (2005) 35 *International Food Policy Research Institute*, CAPRI Working Paper 11.

<sup>187</sup> The conversion of communal land holdings to group ranches was facilitated through legislation. This was primarily through the Land Adjudication Act of June 1968 which provided for the recording of rights and interests in customary lands, and their assignment to their customary users and the Land (Group Representatives) Act which provided for the governance and administration of group ranches. In accordance

The group ranches, discussed in detail in chapter four, eventually failed for a number of reasons, one of which was that the state did not take into account the particular needs of the Maasai and failed to consult the community sufficiently to comprehend the group ranches system. Certainly, it is contended that perhaps the only reason the Maasai accepted the idea of group ranches was because ‘it afforded them protection against further land appropriation from government, against the incursion of non-Maasai and from a land grab by the elite Maasai’.<sup>188</sup> The ‘group ranches’ failed in what some commentators have argued was an indirect policy of opening up and individualizing the Maasai lands.<sup>189</sup> The eventual subdivision of group ranches had various repercussions among the Maasai, the most notable being increased levels of poverty since the pieces of land hived off the ranches were often not sufficient to sustain their livestock and because traditional migratory patterns were blocked as well.<sup>190</sup> The divisions also witnessed a large-scale incursion by mainstream communities who purchased land belonging to some of the recipients of the ranch subdivision.<sup>191</sup> The consequence of the sub-division of the ranches was increased alienation of the Maasai lands through the ‘instrumentality of the law’.<sup>192</sup>

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with the Land (Group Representatives) Act, the group ranch becomes the property of all its members in equal and undivided shares. The group ranches were registered under a group of ten representatives who would be the nominal title holders and held the land in trust of the other unregistered members of the community see Lenaola et al (n 169 above) 248.

<sup>188</sup> See Mwangi (n 186 above) 7; JG Galaty ‘Ha (I) ving land in common: The subdivision of Maasai group ranches in Kenya’ (1994) 34 *Nomadic peoples* 109-121.

<sup>189</sup> As above; see generally Ngugi (n 104 above) 300.

<sup>190</sup> JG Galaty JG ‘The land is yours: Social and economic factors in the privatisation, Sub division and sale of Maasai ranches’ (1992) 30 *Nomadic Peoples* 27.

<sup>191</sup> As above.

<sup>192</sup> Ngugi (n 104 above) 300.

Hunter-gatherers have not been spared from the dispossession of their land and resources by legal processes and policies. This has been mainly through the declaration of the forests they inhabit as protected areas for the purposes of conservation of national resources. The Ogiek's culture and way of life are intimately connected to the forest lands they occupied, yet colonial and successive governments evicted them on the pretext of forest conservation and development.<sup>193</sup> The Ogiek contend that 'the state sanctioned a series of efforts to dispossess them of their land besides seeking to exterminate, assimilate and impoverish them through constant evictions and disruption of their traditional lifestyles'.<sup>194</sup> Their claims are supported by the fact that the same forests were allocated to other individuals and private corporations to harvest timber and farm.<sup>195</sup> The case of the Ogiek's dispossession is discussed in detail as a case study in chapter four.

The Kenyan state has used the powers of eminent domain and police powers to 'regulate the use of indigenous lands without regard for constitutional limits on governmental power that would otherwise be applicable'.<sup>196</sup> This has led to the state gazetting certain lands and territories occupied by indigenous people. While, admittedly, the state should have the powers to utilize resources for the development of the whole state, proper regard to the needs and circumstances of indigenous peoples' resident within those resources should be taken into account. This includes giving the communities rights of access, and the sharing of the proceeds of the resource.

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<sup>193</sup> Kimaiyo (n 120 above) 17. For further background information on the Ogiek see also <[www.ogiek.org](http://www.ogiek.org)> accessed on 10 November 2006.

<sup>194</sup> Kimaiyo (n 120 above) 4.

<sup>195</sup> Stavenhagen Kenya Mission Report (n 35 above) para 37.

<sup>196</sup> Daes final working paper on land (n 4 above) 82.

Further, on the basis of repugnancy clauses the legal framework has limited the application of customary law. Such clauses stipulate that rules of customary law are only valid as far as they are not inconsistent with the constitution and written laws.<sup>197</sup> This poses one of the greatest challenges to indigenous peoples whose only proof to their lands, in most cases, is oral tradition and their connection to culturally-significant places such as graveyards.<sup>208</sup> The situation is exacerbated by illiteracy and a lack of awareness due to a lack of formal education and financial means to access legal services.<sup>198</sup> Indeed, the fact that, indigenous peoples' cultures and traditions are not formally recognised or are looked down upon, affects indigenous peoples' capacity to engage with the formal legal system.

The majority of indigenous peoples' laws, customs and traditions are unwritten. They have been passed on orally from generations to generation. These peoples may therefore not be able to prove their title to the lands they occupy on paper (title deeds). However, according to William Langeveldt, a member of the UN Permanent Forum on Indigenous Affairs, as far as indigenous communities are concerned, it is indisputable that the land is theirs.<sup>199</sup> He argues that most indigenous peoples' proof of their claims to the lands they occupy are supported by the existence of the graves of their ancestors and oral testimony of the various generations of the lands

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<sup>197</sup> See sec 115(2) and 117(5) Constitution of Kenya; See also sec 69 Trust Land Act (Cap 288) See also Stavenhagen Kenya Mission Report (n 35 above) para 64.

<sup>198</sup> Stavenhagen Kenya Mission Report (n 35 above) paras 55-65.

<sup>199</sup> W Langeveldt Contribution during a workshop on 'Indigenous peoples and minorities in Africa' organised by the Southern African Institute for Advanced Constitutional Law and the Centre for Human Rights, University of Pretoria, 13-14 April 2006, Pretoria, South Africa (In file).



inhabitants.<sup>200</sup> However, where controversy arises as to the existence of custom, oral evidence may be inadmissible unless it is supported by other forms of proof.<sup>201</sup> Indigenous peoples in such circumstances are faced with the daunting challenge of ensuring that their lands are recognized, properly demarcated and protected in accordance with their customary laws and traditions.<sup>202</sup> Equally difficult are adequate consultation and gaining compensation for forced resettlement/displacement, evictions and seized lands.<sup>203</sup>

In order to effectively address indigenous peoples' needs, it is imperative that states acknowledge and give regard to the status and situation of indigenous peoples within their territories. Such due regard need not be special or specific to indigenous peoples, but rather one that is designed to redress the historical and continued discrimination and exclusion of all marginalised communities within a state. That could for instance take the form of protection of their fundamental human rights in accordance with their traditions and customs.<sup>204</sup> Through non-discrimination and equality before the law provisions, such a framework should recognize the relation of indigenous peoples to their lands and natural resources.<sup>205</sup> In Kenya, as will emerge later in the thesis, that could entail reform of the law to cater for historical injustices and equal recognition and

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<sup>200</sup> n 199 above; see also C Daniels 'Indigenous rights in Namibia' in Hitchcock & Vinding (n 96 above) 54.

<sup>201</sup> See sec 13, 33(d) & 33(f) Evidence Act Laws of Kenya cap 80.

<sup>202</sup> ACHPR & IWGIA (n 35 above) 21.

<sup>203</sup> J Anaya 'Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources' (2005) 22 *Arizona Journal of International & Comparative Law* 17; see Thornberry (n 35 above) 217.

<sup>204</sup> Anaya J (n 35 above) 142.

<sup>205</sup> Daes final working paper (n 4 above) 78.

application of marginalised communities’ traditional legal system. This is particularly important since the way of life and means of economic sustenance of most indigenous peoples may be different from that of mainstream communities.<sup>206</sup>

### **2.3.2 Inadequate consultation and participation of indigenous peoples over matters affecting their lands rights**

A long history of indifference to indigenous peoples has resulted in extreme levels of poverty and the violation of their fundamental human rights and freedoms. Some states have attempted to forcibly assimilate indigenous peoples without any due regard to their particular way of life, cultures and traditions.<sup>207</sup> These states have adopted policies and development programmes that adversely affect indigenous peoples’ rights to traditional lands and resources without any or adequate consultation with the communities concerned. This state of affairs is often attributed to the fact that ‘these communities have been forced to endure decision making on issues which materially affect them without having been able to have an equal say in this process and thus exert any real influence’.<sup>208</sup>

In Kenya, a lack of legal recognition of indigenous peoples and exclusion from development processes continues to hamper the realization of these communities’ fundamental human rights and freedoms. Some of these groups, such as the Endorois, have been denied equitable and

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<sup>206</sup> Daes final working paper (n 4 above) 78; Stavenhagen Kenya Mission Report (n 35 above) para 25.

<sup>207</sup> Advisory Committee Netherlands (n 68 above) 4.

<sup>208</sup> Advisory Committee Netherlands (n 68 above).

effective consultation and participation on issues that affect them.<sup>209</sup> Others such as the Somali and the Oromo are denied the opportunity to obtain or encounter numerous hurdles when accessing identity documents which hamper their capacity to acquire legal title to their lands and resources.<sup>210</sup> These documents are also required for the enjoyment of citizenship rights such as voting and participation in electoral politics. It also hampers their enjoyment of other fundamental human rights such as freedom of movement within and beyond the country's borders.<sup>211</sup>

Indigenous peoples' precarious circumstances are often linked to their historical and continued marginalisation, social exclusion and discrimination, resulting in an unequal distribution of resources. This is further exacerbated by natural calamities such as drought without proper mitigating interventions from the state; and the imposition of development projects that are often unviable due to a lack of proper consultation and participation of indigenous peoples in their conception and implementation.<sup>212</sup> These factors adversely affect indigenous peoples' rights to development and access to socio-economic rights such as education, health, housing, water and food.

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<sup>209</sup> See *Endorois* case (n 3 above).

<sup>210</sup> Stavenhagen Kenya Mission Report (n 35 above) para 21.

<sup>211</sup> As above.

<sup>212</sup> Stavenhagen Kenya Mission Report (n 35 above) paras 65-7.

As a result, indigenous peoples have as a result lost large tracts of their lands and natural resources to the state ostensibly for public purposes as well as to private investors.<sup>213</sup> For instance, conservation efforts and large-scale infrastructure projects in the name of national development without adequate consultation with indigenous peoples continue to affect indigenous peoples' rights and access to land and resources.<sup>214</sup> Such projects include conservation projects, the creation of national parks, reserves, mining, and construction concessions which are awarded to public and private entities. In Kenya, the establishment of national parks such as the Manyara, Serengeti, Maasai Mara, and Amboseli has caused tremendous land alienation and eviction and restriction of local communities from resources that were critical for their survival without compensation, supposedly in the national interest.<sup>215</sup> The UN Special Rapporteur on Indigenous Peoples in his report on an official mission to Kenya notes that local indigenous communities do not participate in the management of the parks and reserves and do not benefit from the revenue.'<sup>216</sup> This has often caused tension and conflicts with investors and government agencies running the reserves.

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<sup>213</sup> CERD General Recommendation XXXIII (n 71 above) para 3.

<sup>214</sup> These could be for example conservation projects, establishment of national parks and reserves, mining and construction projects. In Kenya for example the establishment of the National Parks such as the Manyara, Serengeti, Maasai Mara, Amboseli has caused tremendous land alienation and eviction and restriction of local communities from resources that were critical for their survival without compensation supposedly in the national interest; The ancestral land of the Ogiek in Kenya in the Mau forest has also been declared a protected forest area. However the same forest has been encroached by logging companies and outsiders for other purposes to the extent that the Ogiek have lodged High Court applications over the matter, see IWGIA *The Indigenous World 2002/2003* (2003) 364-371.

<sup>215</sup> See Stavenhagen Kenya Mission Report (n 35 above) para 53 (with the exception of the Maasai Mara where the Maasai are said to enjoy 19% of the revenues collected).

<sup>216</sup> See Stavenhagen Kenya Mission Report (n 35 above) para 53.

## 2.4 Chapter conclusion

States have a duty to give adequate legal recognition to indigenous peoples' rights to land and resources, as well as to ensure the appropriate consultation and participation of these people in policies and programs that affect their land and resources. Such recognition should include indigenous peoples-preferred land tenure regimes, the applicability of customary laws, and should reflect international human rights standards. Any limitation, if at all, of these rights should 'only flow from the most urgent and compelling state interest', after adequate consultation, participation and negotiation of fair amount of compensation as well as alternative remedies.<sup>217</sup> Having established that land rights are core claims by indigenous peoples, the next chapter surveys the existing legal framework in Kenya and the extent to which it accommodates the land rights of marginalised communities.

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<sup>217</sup> Daes final working paper (n 4 above) 89.